

# In the Supreme Court of the United States.

OCTOBER TERM, 1922.

UNITED STATES OF AMERICA, appellant,  
v.  
BHAGAT SINGH THIND. } No. 202.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE NINTH CIRCUIT.

## BRIEF FOR THE UNITED STATES STATEMENT OF THE CASE.

The Circuit Court of Appeals for the Ninth Circuit has certified to this court the two following questions:

(1) Is a high-caste Hindu of full Indian blood, born at Amrit Sar, Punjab, India, a white person within the meaning of Section 2169, Revised Statutes?

(2) Does the Act of February 25, 1917, 39 Stat. 875, Section 3, disqualify from naturalization as citizens those Hindus, now barred by that act, who had lawfully entered the United States prior to the passage of said act?

This cause came to the Circuit Court of Appeals upon appeal by the United States from a decree rendered by the District Court for the District of Oregon dismissing a bill brought by the United States to cancel a certificate of citizenship issued to Bhagat

Singh Thind in said court. Bhagat Singh Thind is a high caste Hindu of full Indian blood and was naturalized in the District Court of the United States for the District of Oregon on November 18, 1920, over the objection of the United States. Thereafter, the United States filed a bill in equity to cancel his certificate of citizenship on the ground that it was illegally procured, in that the applicant, being a Hindu, is not a white person and not lawfully entitled to naturalization. The District Court dismissed the bill for the reason that the defendant was a Hindu and entitled under the laws of the United States to citizenship. He had lawfully entered the United States prior to the exclusion act of February 25, 1917, and the court held that that act did not prevent the naturalization of a person then lawfully in the United States (p. 1).

#### **ARGUMENT.**

##### **A Hindu is not a white person within the meaning of Section 2169 of the Revised Statutes, and therefore not eligible for naturalization.**

Inasmuch as this court has so recently considered in the *Ozawa case*, decided November 13, 1922, the general meaning of Section 2169 of the Revised Statutes, no extended discussion of the naturalization laws seems to be necessary. In that case it was held that Section 2169 is still in force and limits the right of naturalization to those who are "free white persons" within the meaning of that section, and a Japanese alien was therefore held ineligible. This court found that for many years the Federal and

State courts, in an almost unbroken line, had held that the words "white person" were meant to indicate only what is "popularly" known as the Caucasian race, and said:

"With the conclusion reached in these several decisions we see no reason to differ."

Mr. Justice Sutherland, speaking for the court, said:

"The determination that the words 'white person' are synonymous with the words 'a person of the Caucasian race' simplifies the problem, although it does not entirely dispose of it. Controversies have arisen and will no doubt arise again in respect of the proper classification of individuals in border line cases. The effect of the conclusion that the words 'white person' means a Caucasian is not to establish a sharp line of demarcation between those who are entitled and those who are not entitled to naturalization, but rather a zone of more or less debatable ground outside of which, upon the one hand, are those clearly eligible, and outside of which, upon the other hand, are those clearly ineligible for citizenship. Individual cases falling within this zone must be determined as they arise from time to time by what this Court has called, in another connection (*Davidson v. New Orleans*, 96 U. S. 97, 104) 'the gradual process of judicial inclusion and exclusion'."

The instant case shows the wisdom of the cautionary statement above quoted, for the court is now required to deal with one of the "border line cases," at least when considered ethnologically. It is the concensus of opinion of ethnologists that the high

caste Hindus, of which Bhagat Singh Thind is one, are members of what is commonly recognized as the Aryan family. These authorities are set forth in the elaborate and able brief filed by the respondent in this case and seem to afford little ground for challenge, but the decision in the *Ozawa case* did not establish a sharp line of demarcation but rather a zone of more or less debatable ground, leaving individual cases to be determined as they arose. After all has been said, the question still remains one of statutory construction, and primarily the point to be decided is the meaning which the words "free white persons" had in the minds of those who in 1790 first used those words in the statute of the United States. (Stat. 103, ch. 3.)

This question perhaps may be extended so as to include in its consideration the meaning attached to the words in 1870, when the naturalization laws were extended to aliens of African nativity and to persons of African descent, and in 1875, when the words "free white persons" were restored to the Revised Statutes after they had been inadvertently omitted from the first edition in 1873. The Act of July 14, 1870, 16 Stat. 254, provided "that the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent." When that act was under discussion, an amendment was offered by Charles Sumner to strike out the word "white." But the amendment was rejected through the efforts of the Western senators, who objected that it would authorize the naturalization of "Asiatics." The Hindus

are undoubtedly Asiatics. *Congressional Globe* for 1869-70, Pt. 6, pp. 5121-5125, 5163, 5176-5177. In the discussion the word "Asiatics" was used repeatedly, and, while the senators who used the word may only have had in mind Chinese or Japanese rather than the people of India, nevertheless, the term "Asiatics" was that which seemed to express their policy of exclusion. At that time the only question which threatened to become one of practical importance was the Chinese question. There was practically no other Asiatic immigration.

By act of February 18, 1875, 18 Stat. 316, 318, ch. 80, the error in the first edition of the Revised Statutes in omitting the words "free white persons" was corrected. The committee on the Revision of the Laws had submitted a bill to correct numerous similar omissions. There was considerable discussion, and again the word "Asiatics" was the word commonly used in the debate. 3 Congressional Record, 1081. In the Senate Mr. Sargent said:

"We have the guaranty of the committee that the provisions of this bill simply restore the law as Congress intended it should be at the time they passed the Revised Statutes. Let that be done and it is fair. Less than that is unfair. When that is done, if the Senator desires to bring forward a bill which shall enable Asiatics to be naturalized, I shall be prepared to debate that question with him." (3 Cong. Rec. 1237.)

Similarly, Mr. Ferry said:

"Mr. President, it is obvious, after what has fallen from the lips of the Senator from Califor-

nia and the Senator from New York, that the real question after all can not be taken upon the amendment that I have proposed. That question would be whether the Senate would deliberately exclude from the operation of the naturalization laws all Asiatics, a third of the human race or more." (3 Cong. Rec. 1238.)

So the words inadvertently omitted in 1870 were restored as they had stood since 1790, apparently with the understanding that any change, if made, would necessitate a discussion and final settlement of the whole question of naturalizing Asiatics, a question which Congress obviously did not care to consider at that time. The words "free white persons" may be regarded therefore as having the same meaning which they had in 1790, in the light of the construction which had been placed upon them since, and as understood by Congress in 1875 when it refused to open up the question of admitting Asiatics to citizenship.

Naturalization is therefore restricted to "free white persons." Are these words merely words intended to exclude undesirables, or must they be considered as words affirmatively describing the class to be admitted. This question was answered in the *Ozawa case*, as follows:

"The provision is not that Negroes and Indians shall be *excluded* but it is, in effect, that only free white persons shall be *included*. The intention was to confer the privilege of citizenship upon that class of persons whom the Fathers knew as white, and to deny it to all who could not be so classified. It is not enough to say that the framers did not have

in mind the brown or yellow races of Asia. It is necessary to go farther and be able to say that had these particular races been suggested the language of the Act would have been so varied as to include them within its privileges. As said by Chief Justice Marshall in *Dartmouth College v. Woodward*, 4 Wheat. 518, 644, in deciding a question of constitutional construction: 'It is not enough to say, that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.' If it be assumed that the opinion of the framers was that the only persons who would fall outside the designation 'white' were Negroes and Indians, this would go no farther than to demonstrate their lack of sufficient information to enable them to foresee precisely who would be excluded by that term in the subsequent administration of the statute. It is not important in construing their words to consider the extent of their ethnological knowledge or whether they thought that under the statute the only persons who would be denied naturalization would

be Negroes and Indians. *It is sufficient to ascertain whom they intended to include and having ascertained that it follows, as a necessary corollary, that all others are to be excluded.*"

It is therefore necessary to determine whom they intended to include, not whom they intended to exclude. If they meant to include *only* men of the white races, does it follow that they intended to include *all* who could possibly be classed by *ethnologists* as white? We think not. The words "free white persons" meant to them men representative of a composite type, a combination of color, race, and social institutions, with which they were familiar, men who collectively had developed and were maintaining a civilization of which they themselves were a part, the civilization of white men.

According to the *Encyclopedia Britannica*, 11th ed., vol. 14, title "India," India is "inhabited by congeries of different races," and had according to the census of 1901 a population of over 294,000,000. This vast mass of people does not constitute a single nationality, neither is it divided into a number of different nations of distinct blood or distinct language. They are drawn into four well-marked elements: (1) The non-Aryan tribes; (2) the Aryan or Sanskrit-speaking race; (3) the great mixed population which has grown out of the fusion of the two previous elements; (4) and the Mahomedan invaders from the Northwest. "These four elements, however, have become inextricably mixed together, some predominating in one portion of the country, some in another, while all are

found in every province and native state." For this reason, it is not easy to determine what is a "Hindu of full Indian blood." (p. 382.)

The chief modern divisions of the population do not follow the lines of blood and language, but of religion and caste. Of the four elements just mentioned the oldest are the wild tribes of Central India, who represent, probably, the original inhabitants of the country and number about 11,000,000. Next come the Dravidians of the South, about 54,000,000. These are probably the aborigines. Thirdly, the Aryans inhabiting what is known as Hindustan proper, and of these only the Brahmans and Rajputs, about 20,000,000, are believed to be of pure Aryan blood. The remaining 135,000,000 natives represent the fusion of Aryan and non-Aryan elements. Fourthly, come the Mahomedans numbering some 62,000,000, many of whom are descendants of Arab, Afghan and Mogul invaders and the others are converts made to Islam in the course of centuries of Mahomedan rule. (p. 382.)

According to this same authority (p. 383) the chief Indian religions with the number of their followers are, approximately:

Hindu.....	207, 000, 000
Mahomedan .....	62, 000, 000
Bhuddist.....	9, 000, 000
Sikh.....	2, 000, 000
Jain.....	1, 300, 000
Christian.....	2, 900, 000
Parsee.....	94, 000
Animist.....	8, 500, 000

According to the linguistic survey of India, no fewer than 147 distinct languages are recorded as vernacular in different parts of India (p. 383).

The real beginning of the British Indian Empire dates from 1757, the Battle of Plassey, fought on the 23d of June of that year. The military genius of Clive and the administrative genius of Warren Hastings thereafter established upon a firm foundation the rule which has lasted ever since, but down to 1790 and for many years thereafter British domination in India was really exercised by the East India Company. India, with its millions of people, was regarded merely as a profitable field for commercial exploitation, a source of untold wealth. To be sure, Christian missionaries were working there, but their efforts were directed toward people whom they somewhat superciliously looked upon as "heathen," just as the Greeks regarded all non-Greeks as "barbarians." The people of India were a subject-race, and, while the ideals of liberty, equality and fraternity were being preached in Europe and America, there is no reason to believe that any one seriously extended their applications to the people of India, or believed that those people were of the kind to be assimilated in citizenship in Western civilization. Even the unselfish interest of the missionaries was rather in the welfare of souls in the life to come, than in political and social fellowship in this life.

Two years before the passage of the Act of 1790 Edmund Burke, addressing the House of Lords in the Warren Hastings trial, said:

"My Lords, the first description of people who are subjected virtually to the British empire through those mediums which I have described to you are the original inhabitants of Hindostan, who have in all time, and beyond all the eras which we use, (I mean always the two grand eras excepted,) been the aboriginal inhabitants and proprietors of that country,—with manners, religion, customs, and usages appropriated to themselves, and little resembling those of the rest of mankind. This description of men is commonly called Gentoos. The system and principle of that government is locality. Their laws, their manners, their religion are all local.

\* \* \* "—These people are, of all nations, the most unalliable to any other part of mankind. They cannot, the highest orders of them, at least, cannot, come into contact with any other. That bond which is one of the chief instruments of society, and which, supporting the individual, connects the species, can have no existence with them: I mean the convivial bond. That race can be held to no other by that great link of life. No Hindoo can mix at meals even with those on whom he depends for the meat he eats. This circumstance renders it difficult for us to enter with due sympathy into their concerns, or for them to enter into ours, even when we meet on the same ground. But there are other circumstances which render our intercourse, in our mutual relation, very full of difficulty. The sea is between us. The mass of that element, which, by appearing to disconnect, unites

mankind, is to them a forbidden road. It is a great gulf fixed between you and them,—not so much that elementary gulf, but that gulf which manners, opinions, and laws have radicated in the very nature of the people. None of their high castes, without great danger to his situation, religion, rank, and estimation, can ever pass the sea; and this forbids, forever, all direct communication between that country and this. That material and affecting circumstance, my Lords, makes it ten times more necessary, since they cannot come to us, to keep a strict eye upon all persons who go to them. \* \* \*

"It may be necessary just to state to your Lordships what a *caste* is. The Gentoo people, from the oldest time, have been distributed into various orders, all of them hereditary: these family orders are called castes; these castes are the fundamental part of the constitution of the Gentoo commonwealth, both in their church and in their state.

\* \* \* "They are divided into four orders,—the Brahmins, the Chittery, the Bice, and the Soodur, with many subdivisions in each. An eternal barrier is placed between them. The higher cannot pass into the lower; the lower cannot rise into the higher. They have all their appropriated rank, place, and situation, and their appropriated religion too, which is essentially different in its rites and ceremonies, sometimes in its object, in each of those castes. A man who is born in the highest caste, which at once unites what would be tantamount in this country to the

dignity of the peerage and the ennobled sanctity of the episcopal character, the Brahmin, who sustains these characters, if he loses his caste, does not fall into an inferior order, the Chittery, the Bice, or the Soodur, but he is thrown at once out of all ranks of society. He is precipitated from the proudest elevation of respect and honor to a bottomless abyss of contempt,—from glory to infamy,—from purity to pollution,—from sanctity to profanation. No honest occupation is open to him; his children are no longer his children; their parent loses that name; the conjugal bond is dissolved. Few survive this most terrible of all calamities. To speak to an Indian of his caste is to speak to him of his all. \* \* \*

"My Lords, these Gentoo people are the original people of Hindostan. They are still, beyond comparison, the most numerous. Faults this nation may have; but God forbid we should pass judgment upon people who framed their laws and institutions prior to our insect origin of yesterday! With all the faults of their nature and errors of their institutions, their institutions, which act so powerfully on their natures, have two material characteristics which entitle them to respect: first, great force and stability; and next, excellent moral and civil effects.

"Their stability has been proved by their holding on an uniform tenor for a duration commensurate to all the empires with which history has made us acquainted; and they still exist in a green old age, with all the reverence of antiquity, and with all the passion that

people have to novelty and change. They have stood firm on their ancient base; they have cast their roots deep in their native soil,—perhaps because they have never spread them anywhere else than in their native soil. Their blood, their opinions, and the soil of their country make one consistent piece, admitting no mixture, no adulteration, no improvement: accordingly, their religion has made no converts, their dominion has made no conquests; but in proportion as their laws and opinions were concentrated within themselves, and hindered from spreading abroad, they have doubled their force at home. They have existed in spite of Mahomedan and Portuguese bigotry,—in spite of Tartarian and Arabian tyranny,—in spite of all the fury of successive foreign conquest,—in spite of a more formidable foe, the avarice of the English dominion. (Writings and Speeches of Edmund Burke, 1901, Vol. IX, p. 367 *et seq.*)

These words were spoken by a friend of America, as well as of India and its people. They were probably well known to those who initiated our naturalization policy, for the Warren Hastings trial was one of the great events of that day. They show that at the time the first naturalization law was passed the Hindus were regarded as a people wholly alien to Western civilization and utterly incapable of assimilation to Western habits and customs, mode of life, political and social institutions. Is it to be believed that our forefathers had, even in a remote way, any idea that these people would ever

come to our land or wish to become our citizens? The words of our naturalization laws must be construed as affording a positive rule of inclusion, not a negative rule of exclusion. The men of 1790 never dreamed of an immigration from India, and, if that be true, it carries with it the inevitable conclusion that they did not intend to provide for the naturalization of people from India. They offered citizenship to men of the kind they knew and hoped and expected would come, not to those they did not know and did not expect to come. Citizenship has always been deemed a choice possession, and it is not to be presumed that our fathers regarded it lightly. It could only be obtained by those to whom it was given, and the men of 1790 intended it only for those whom they knew and regarded as worthy to share it with them,—men of their own type,—men in a general way living under the same social conditions, sharing or wishing to share the same political institutions and capable of entering into the life of this country in a spirit of sympathy and cooperation. The word “free” cannot be wholly ignored. It was not merely the opposite of African slavery. It referred to a type of civilization. All peoples whom they knew in this sense were of the type commonly and popularly called “free white” men, and it is undoubtedly true that the word “white” was by them indicative of type rather than color. Of course, it was exclusive of brown, yellow, red, and black, but, we contend,

inclusive only of such men described by the adjective "white" as belonged to a civilization known as the white civilization. Such was the civilization of Europe. While the population of Europe comprised many racial families, and differed in the dark skinned races of the Mediterranean and the fair blond Nordics, nevertheless, its civilization was that which had been developed by the race of white men and differed from the civilization of Asia in almost every distinguishing peculiarity. The white races had put their brand upon organized social and political life, and the social and political life, in turn, had put its assimilating mark upon all who had come within its influence.

Thus the term "white men" had come to represent men of the white civilization, as distinguished from the Eastern or Oriental civilization. This does not imply the drawing of any narrow or bigoted racial lines, but a broad classification inclusive of all commonly called "white" and exclusive of all not commonly so-called.

It could never have been contemplated by those who framed the statute that naturalization should be thrown open to the teeming millions of Asia, subject only to the presentation of a certificate by some student of ethnology to the effect that the particular applicant, whatever might be his customs, religion, habits of thought, language, could probably trace his ancestry back through thousands of years to membership in the race then coming to be called for the first time "Caucasian." It must be remem-

bered that Blumenbach first used this word in his classification of races in the year 1781. It is possible, but not probable, that the members of Congress in 1790 were unaware of Blumenbach's famous and workable classification, which endured to this day, but it is equally clear, indeed, we must assume, that they had in mind a definite conception of the type of men which they wished to become citizens of this country and which they described by the term "white men." In the case of *Sadar Bhagwab Singh* (246 Fed. 496), Judge Dickinson, in the District Court for the Eastern District of Pennsylvania, denied the application of a member of the Hindu race and wrote a long and scholarly opinion which seems to us to be sound. He said (p. 498):

"By a process of elimination we are thus brought or driven to the only remaining test, which is this: Our people, when the first naturalization act was passed, had a really definite idea of those to whom the privilege of citizenship was to be extended. The difficulty was, not in getting into accord upon the thought, but the difficulty was in finding a word or phrase which would express it. Resort was had, as the only recourse, to the common speech of the people, which provided a phrase ready at hand, which expressed the thought meant to be conveyed. The phrase was 'white person.' Its meaning was wholly conventional, and the convention evidenced by the meaning which the common man extracted from it. It made no pretense to be a term of science, and was not chosen with a view to scientific definiteness or accuracy of expression."

In *United States v. Balsara*, 180 Fed. 694, the Circuit Court of Appeals for the Second Circuit affirmed an order admitting to citizenship a Parsee. In *in re Halladjain*, 174 Fed. 834, Judge Lowell, in the Circuit Court of the District of Massachusetts, admitted to citizenship an Armenian. In *in re Mohan Singh*, 257 Fed. 209, the District Court for the Southern District of California admitted to citizenship a Hindu, declining to follow the opinion of Judge Dickinson in the *Sadar Bhagwab Singh case, supra*. In *in re Mozumdar*, 207 Fed. 115, the District Court for the Eastern District of Washington admitted to citizenship another Hindu. In these cases the different judges wrote long opinions, carefully construing the question from many angles. Indeed, the amount of learning and patient research which has been devoted to consideration of these questions has exhausted the literature upon the subject but has only added to its difficulty.

The *Ozawa case* has clarified the situation much, but, as intimated in that opinion, the field for discussion is still a wide one. We can only say, in summary, that while, in a general way, naturalization is only open to people belonging to the race commonly called Caucasian, nevertheless it is not open to all whom the research of scholars assumes to be of that race. The very name is a misnomer and an accident. The test must be a more open and obvious one than that. It is to be found not by the researches of scholarship but by

the practical application of the good sense and common understanding of ordinary men in the light of history and experience. We think that only such members of the Caucasian race should be held eligible for naturalization as may be found to be representatives of a white civilization. Viewed in this way the people of India, from whatever stock they may have sprung, cannot be included. Though they may have kept their blood pure for centuries, nevertheless, the centuries have removed them far from political fellowship with the white men of the Western World.

Neither in popular speech nor in literature has the term "white man" ever been used as appropriate to describe the Hindu. On the contrary, they are popularly classified as of the "brown" race. Whatever the Hindu may be to the ethnologist.—and ethnology was an almost unknown science in 1790,—in the popular conception he is alien to the white race and part of the "white man's burden." This phrase of Kipling, the great poet of the imperial destinies of the white race, has become part of the language and understanding of the English-speaking race. And, while the problem of British rule in India is not our affair, whatever may be the white man's burden, the Hindu does not share it, rather he imposes it. From Edmund Burke to Rudyard Kipling there has been no change in this respect. To call him a white man would be to give a judicial interpretation contrary to the universal acceptation of the term.

To sum up, I submit that, so far as the policy of exclusion from the benefits of naturalization can be expressed in a phrase, the expression in our laws "a free white person," to which the Congress has now adhered for a hundred and thirty years, denominates what is historically known as the men of the Western civilization. What is this Western civilization cannot be wholly determined upon either geographical, philological, or ethnological bases. It can only be determined in the light of history.

Western civilization, which now includes the Americas, is something more than European civilization; although the largest field of its operations was Europe. It is something more than the Aryan family; for the Semitic races,—including the Phoenician, Assyrian, Arabian, Chaldean, Aramaic and Hebrew,—which are not Indo-European or Aryan, are not excluded from it. Indeed, our Western civilization began with the Semitic races in Egypt, extended to Assyria and Chaldea, passed thence into Crete and Greece, and finally found its dominating expression in the great Roman Empire, which was essentially a Mediterranean civilization. Thence it proceeded northward, into the forests of Gaul, and crossed the Channel into England.

Western civilization may, therefore, include so much of the Near East as contributed to, and was assimilable, with the development of Western civilization of Greece and Rome. Language, literature, religion, government and races, both of the Aryan

and of the Semitic roots, became blended into the European civilization of Rome, and were extended by the genius of Columbus to the Americas.

This is the Western civilization, sometimes denominated the European civilization, which our fathers knew and from which they were willing to recruit the citizenship of the Republic; but the Far East, including India, was not regarded by them as a part of such civilization. To them, naturalization of the Far East Asiatics was unthinkable, because immigration of the teeming millions of Asia into America was likewise unthinkable.

All this is said with full appreciation of the wonderful civilization of the Far East, such as existed when our Government was formed, and still exists to this day in the great empires of Japan, China and India. Undoubtedly, our Western civilization has always maintained a supercilious and provincial attitude towards these older civilizations, which were in full flower before our Western civilization began, and which may possibly be in existence if and when our Western civilization shall wane. When Europe was inhabited by peoples who were little removed from the neolithic man and were virtually savages, China and India enjoyed a literature and art which, in some respects, have not yet been surpassed in our somewhat arrogant Western civilization. All this is true; but it does not alter the fact that the policy of America has been,

in the matter of citizenship, only to include those of the Western civilization, with which it is assimilable and of which it is one of the greatest products.

We do not think it can fairly be claimed that the Immigration Act of February 5, 1917, 39 Stat. 875, necessarily operates as matter of law to disqualify from naturalization Hindus who were at the time of the passage of that Act lawfully within the country, if they were eligible before. It does indicate, however, the attitude of Congress toward Asiatic people. It does not mention Hindus by name but prohibits immigration of natives of the continent of Asia, within certain limits of latitude and longitude which include the whole of India.

#### CONCLUSION.

The first question should be answered in the negative, and that makes it unnecessary to answer the second.

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